

## Michael Marino shooting – June 9, 2012 – Sellersville, PA

### I. The Incident

At some time before the late afternoon of Saturday, June 9, 2012, Michael Marino broke into and set up housekeeping in the vacant sign factory located at 201 West Clymer Avenue in Sellersville Borough. The factory is located in the middle of a residential neighborhood. The factory is adjacent to the railroad tracks operated by East Penn Railroad as a freight line. Marino's silver/gray Toyota automobile (license HVM6907) was parked on the far side of the factory from Clymer Avenue, immediately next to a door which had been forced open. An armchair had been set up between the vehicle and the building. Various cans of food and toiletries were found on shelves in the portion of the warehouse nearest the forced entry. Subsequent investigation disclosed that at some time prior to 4:00 p.m. on Saturday, Marino had placed a device resembling a bomb under the railroad track, approximately 800 feet north of the sign factory, behind Sellersville Fire Station 27. The bomb investigation is separately discussed herein.

A convenience store is located at the intersection of Clymer Avenue and East Park Avenue. This lies a long block from the warehouse occupied by Marino. At approximately 4:00 p.m. on Saturday, June 9, Michael Marino was first reported in the vicinity of the convenience store wearing a yellow plastic rain poncho and carrying a large plastic container of iced tea. As he made his way back down Clymer Avenue in a westerly direction toward the railroad tracks, he periodically obstructed traffic and otherwise brought himself to the attention of a number of people who were prompted by his actions to call police radio. As described by Clymer Avenue residents and passing motorists, Marino walked down the middle of the street, shouting and acting in a menacing fashion.

At the time of these events and his subsequent encounter with police, Marino was wearing long underwear pants, socks, gray colored Croc type shoes, and a pair of light colored camouflage BDU style shorts. He was shirtless under a yellow plastic rain poncho. The temperature was in the mid-80's, without precipitation.

As he walked west down Clymer, Marino was screaming various epithets and striking signs. Among the various quotations attributed to Marino by witnesses were "You bitches are going to pay", a string of racial obscenities followed by the statement "I'm going to kill you, I'm going to kill everyone", "I'm going to kill you mother-f...ers", and "F... the world". One witness described Marino as growling at him in an intimidating way. A motorist crossed the railroad tracks at Clymer Avenue and observed the then shirtless Marino. She was going to stop to ask if he needed help but then as she described it, "He looked at me with a stare with pupils black and enlarged and I thought to myself – holy ...., I'm out of here." One neighbor described Marino's face as red with his veins popping out, looking really angry or frustrated.

Among the citizens who encountered Marino on that Saturday afternoon were the Gallaghers, a husband and wife from Montgomery County who were on a motorcycle ride and encountered Marino near the Mini-Mart. Mrs. Gallagher observed Marino across the street from the store as he proceeded down Clymer Avenue. She recalled that he yelled over at her and her husband that "we are all going to burn in hell". On the basis of what they had seen, Mr. Gallagher was among those who called 911. As a result of these calls, Officer Graff and Sgt. Rothrock of the Perkasio Borough Police, who provide police coverage to Sellersville Borough, were dispatched to Clymer Avenue.

As the officers arrived on the scene, numerous residents along Clymer Avenue pointed toward the railroad tracks but Marino was not immediately located. Mr. Gallagher had ridden his motorcycle west on Clymer Avenue past the tracks. As he came back toward the factory, he observed Marino's poncho hanging on a tree growing on the side of the factory facing the railroad tracks. He alerted police to the location of the poncho and was requested to park his motorcycle and to wait in the lot across Clymer Avenue from the empty sign factory.

As the officers approached from the parking lot side of the building, they observed the Toyota parked between the main factory building and an outbuilding under an awning. They observed a chair which had blankets and towels on it as though someone had been sleeping there.

Sgt. Rothrock and Officer Graff found Marino sitting with his back against the building facing the railroad tracks. The terrain rises toward the building as though dirt and perhaps mulch had been piled against the wall of the factory over time. The ground falls significantly as one proceeds west toward the railroad track and then rises again when one reaches the ballast on which the ties for the track are laid.

Officer Seth Mumbauer of Perkasio Borough Police Department was also on patrol at that time on June 9. Before he could respond to Clymer Avenue he was dispatched to another call. After clearing that call he proceeded to West Clymer Avenue. As he described it, "As I was pulling up to the old EPC Sign building, I noted two men on West Clymer Avenue. One was straddling a motorcycle and the other was standing in the roadway. They were directing me, with their arms, down the train tracks. I parked my patrol car and jogged over to the train tracks. I saw Sgt. Rothrock and Officer Graff were in dialog with the subject near the building. Both Sgt. Rothrock and Officer Graff were standing in a 'valley'. The subject was sitting on a hill, above them, near the building. He was yelling obscenities at various times."

Sgt. Rothrock is a trained hostage negotiator. He has completed both the three-day basic school and the three-day advanced school in crisis intervention techniques offered by the Montgomery County Emergency Services. As the Sergeant spoke with Marino he was shirtless and was observed to be sweating profusely. He appeared agitated and intermittently spoke gibberish which to the officers sounded vaguely like German. After Officer Mumbauer arrived on the scene, he offered to the other officers to begin canvassing the witnesses who were still out of their houses along Clymer Avenue but was requested to remain with his fellow officers in contact with Marino. Sgt. Rothrock asked questions of Marino who would appear to have moments of clarity and then slip into a state of incomprehension. When asked how old he was, he said that he was 27 and then corrected himself and said 26. He was asked what kind of medications he was receiving and rattled off several names which the Sergeant recognized as anti-psychotics. When asked if he had taken his medications today, Marino said that they didn't help him.

When initially engaged in conversation by Sgt. Rothrock and Officer Graff, Marino was asked what was going on. He stated that he was kicked out and was having a bad day. He went in and out of speaking gibberish and was very agitated. Despite the efforts of all of the officers to speak calmly and reason with Marino, he remained agitated, insisted that he was not going anywhere and was not going to speak with anyone about his mental health situation. He stood up and took an aggressive stance facing the officers stating, "I feel like I'm god. No, I know that I'm god. If you don't know who I am, then you don't read the Bible."

Ultimately Sgt. Rothrock advised Marino that they had no desire to arrest him but that he needed to go to Grandview Hospital. Marino's response was, "No. I'm not going and I'm not afraid of

you guys.” At this point Sgt. Rothrock asked Officers Mumbauer and Graff if they were ready to take the subject into custody. They stepped up the embankment to the higher ground where the subject was standing. Officer Mumbauer went to the left of the subject and took his right arm while Officer Graff endeavored to control Marino’s left arm and his head. Marino was very resistant, flailing and intermittently tensing his arms and body while yelling gibberish. Officer Mumbauer describes the process of cuffing Marino as follows: “I pulled my cuffs out and was trying to cuff the left arm. When this cuff clicked, on the left arm, I then tried to get the right cuff on. This hung up, possibly on the subject’s pants. When cuffs get caught up on cloth there is no sound or feel of the cuff’s ratchet. I did not hear the click. I did not double lock the cuffs because the subject was combative and because we were on uneven terrain.”

Once cuffed, Marino became momentarily calmer. At this juncture, Sgt. Rothrock noticed that Mr. Gallagher had walked down the railroad tracks approaching their position. Rothrock turned and walked toward Gallagher, asking him to wait up on Clymer Avenue where he had parked his motorcycle. At this juncture the Sergeant heard a gunshot. From recorded radio transmissions, it appears that the Sergeant was speaking with police radio to request the rescue squad to transport Marino to the hospital at the time the shot was fired.

During these moments Officer Graff had begun to pat the subject down to make sure he was not armed. As he described it, “I patted down the subject’s right front pocket and felt a large soft object which the subject stated was marijuana. I went to pat down the subject’s left front pocket and began to feel multiple hard objects. As I was patting the left pocket, the subject began to flip out. The subject began yelling gibberish and was kicking and flailing his body. The subject began dropping to the ground as he was kicking and flailing violently. I went to the ground with the subject trying to control his legs. As I was attempting to control the subject’s legs I was knocked backwards down the embankment and disoriented. During this timeframe I heard a loud bang. When I looked up I saw the subject lying on his back with a hole in his chest.”

Officer Mumbauer described the events which followed Officer Graff’s pat-down as follows: “The subject dropped down, dead weight. I tried pulling him up but I needed help. I was behind the subject. I used my arms to hook under the subject’s arms. The subject pulled forward and twisted his body in a quick/violent motion. It was like an alligator roll. I fell with him and was unable to hold on to him. The subject landed on the ground at the hill’s edge. The ground was a mix of rock and soil and my footing was not secure. The subject was using all of his effort at this time to kick upwards at us. We were still on an embankment. The subject was above me. I was below him with my back to the railroad tracks. I tried to grab at him to control him. I could not grab onto anything. Officer Graff was to my left at this time. Sgt. Rothrock had previously walked behind me toward Clymer Avenue. The subject was twisting his body to direct his kicks at us. I remember Officer Graff being kicked or thrown out of view. I knew that we were losing this fight. I believed the subject must have thrown a cuff. I was still trying to grab hold of the subject, in an attempt to secure him, when I was kicked, by the subject, up under my jaw. The force of this kick sent my head back and to my right. The force of this kick made me feel like I was in a fog. I then felt a very sharp blow to my crotch. The kick to the head and to the groin made me feel like I would go unconscious if kicked again. The force knocked me back, and slightly down the hill. I knew he was within a few feet of me and could easily jump for me and try to get my gun. He could have gone to either side of me at that point but he didn’t. Instead the subject started to come directly at me by rocking his body to get up in one forward motion. The subject immediately lurched forward toward me. He planted his feet within a foot of my feet and I knew he could jump into me and knock me into the bottom of the valley. I knew he had gotten the upper hand and was still able to fight. I feared for

our safety. I believed that the subject may have thrown a cuff, or was armed. I believed that he might grab my gun. I took a step back and drew my duty weapon. As he rocked up and came at me, I fired a single shot into the chest of the subject. He immediately dropped back to the ground and stopped moving."

Paramedics were summoned and emergency aid was rendered. However, Marino was determined to be dead and his body remained at the scene for the purposes of investigation.

Mr. Gallagher had remained along the railroad tracks, gradually approaching from Clymer Avenue throughout these events. As Mr. Gallagher described it, "Three officers were speaking to him for approximately five minutes. The fellow was yelling and telling them that 'he was not going to no hospital, and no one is putting him on medication.' 'That he already takes six different things per day'. As an officer was walking back towards me, I saw the man scuffling, one officer came down the hill backwards and I heard a pop."

Officer Mumbauer was transported to Grandview Hospital where the doctor on duty ordered a CT scan of his head. He experienced stiffness in his jaw and noted that it was cracking on the left side. He was released from Grandview Hospital with a prescription for Lorazepam and experienced tightness and stiffness for several days along with a pounding headache. He also found that his left shoulder and lower back were stiff for several days. Officer Graff was evaluated and released by Grandview Hospital. He experienced stiffness in his neck and pain in both knees which had black and blue bruises. Sgt. Rothrock remained at the scene and assisted crime scene investigation until he began to experience chest pain and was transported to Grandview Hospital for evaluation.

## II. The Investigation

At approximately 4:45 p.m. on June 9 Perkasio Police Department Chief Gura notified the Assistant District Attorney on call, the Bucks County Detectives and the Central Bucks Crime Scene Unit of the police involved shooting of Michael Marino. Various County Detectives and Crime Scene Unit personnel were dispatched to 201 West Clymer Avenue and by approximately 7:00 p.m. the District Attorney's Crime Scene truck was on location. The body of the deceased was in the approximate location to which he had fallen after being shot by Officer Mumbauer. An airway had been inserted in his mouth and defibrillator pads were on his chest as a result of efforts by EMS personnel to resuscitate him. After photographing and documenting the scene, Bucks County Deputy Coroner Rosenberger rolled Marino onto his side. It was observed that the subject was handcuffed to the rear with his palms facing outward.

A silver colored Toyota Celica registered to Mr. Marino was parked adjacent to the warehouse building. Taped to the rear of the Toyota automobile was a sheet of paper appearing to denounce church and government. A copy of same is attached hereto. Through a door which appeared to have been forced open in the main warehouse building were shelves which contained several bags of snack foods, toiletries and some clothing. In a parking lot on the north side of the warehouse building, an empty Herr's "Red Hot" potato chip bag was lying on the ground with the potato chips strewn around the parking lot area. Also observed were two empty drain cleaner containers, one in the parking lot and a second lying nearby on the railroad tracks.

The scene was documented by standard digital photography as well as by the use of a Panoscan panoramic camera system capturing 360° images. Panoscan pictures were taken from the railroad

tracks directly in front of where Mr. Marino's body was located, from the second set of railroad tracks approximately 50 yards east of the body location and from the parking lot of the building.

Lt. Gorman of the Bucks County Detectives prepared a scene diagram using the Nikon Total Station Measuring Device documenting all significant features of the scene including the location of the decedent's body in scale. A copy of the diagram is attached hereto.

A search of the Toyota vehicle registered to Marino produced a letter dated July 29, 2011, reflecting a determination of disability effective February 1, 2010. Two prescriptions for Adderall, an 8-ounce bag of sage, a prescription bottle bearing Mr. Marino's name containing amphetamine salts, various banking receipts and caffeine pills were also found.

Gathered from around the body of the decedent and from his clothing was a bag of suspected marijuana, a "smoking kit" including rolling papers, a glassine bag of brown powder and two pipes. Also found around (and at autopsy, inside of) the body were a number of small translucent plastic pellets. Similar pellets were also observed floating in the partially consumed WaWa iced tea container found near the body. A package of menthol cigarettes and a second box containing one cigarette were found on the embankment near the body. Also on the embankment near the body was a metal cigarette container with a package of cigarette rolling papers. The wrapper for the yellow poncho was found in the parking lot and the poncho itself was found hanging in a tree near the decedent's body.

Parked on one of the railroad tracks several hundred feet north of Clymer Avenue was a closed railroad car designed to carry bulk materials. This was designed to be emptied from discharge ports located at the bottom of the car. Under one of the discharge ports of this rail car, a number of plastic pellets had spilled out onto the ground. These pellets appeared to be identical to those found in the open iced tea container near the body. At autopsy Dr. Ian Hood discovered what he described as "a myriad" of these small white plastic beads in Marino's pharynx, esophagus and stomach.

The autopsy confirmed that Michael Marino died of a single gunshot wound to the left anterior upper chest. The gunshot entry wound was surrounded by a ten-inch diameter patch of sparse stippling consistent with a relatively close non-contact proximity of the muzzle of the weapon to the decedent. No apparent explanation is offered for the apparently voluntary ingestion of substantial quantities of bulk plastic beads, apart from the drugged and agitated state of the decedent.

County Detectives canvassed the area in which these events had occurred and found thirteen witnesses in addition to Mr. and Mrs. Gallagher who had observed some part of the incidents preceding the shooting death of Michael Marino. Mr. and Mrs. Gallagher had each prepared a hand-written statement on the afternoon of June 9 at the request of investigating officers.

Each of the three Perkasio officers present at the time of the shooting were interviewed separately by Bucks County Detectives. In addition they were requested to prepare detailed written reports independently, which they did.

After all of these investigative steps had been taken, because of the unarmed and handcuffed state of the decedent Marino at the time he was shot, it was determined that a re-enactment of the events leading up to the shooting by all three of the police participants would be desirable for the purpose of assessing the accuracy and credibility of their accounts. Accordingly, on June 21, 2012, Detectives Walp and Hanks, together with Chief of Prosecution Robert James, having reviewed the

entire investigative file, went to the scene of these events at 201 West Clymer Avenue. The three Perkasio Borough police officers involved were invited to the scene. Each came to the scene separately and each was interviewed independently, out of the presence of the other two.

Each individual was asked to recount and explain to detectives and the Deputy District Attorney the events involved in this matter as they recalled them at the scene of the shooting. At the request of the investigators they re-enacted their physical movements in connection with these events, and where appropriate demonstrated the position of the decedent and his movements and actions. Each of these re-enactments occurred when only the officer being interviewed was at the Clymer Avenue scene. After each of the officers had in turn participated in reconstructing these events, the exercise was concluded and the detectives and Deputy District Attorney returned to Doylestown and reported to the undersigned.

The account of each of the officers was found to be consistent with those of the others and consistent with the physical evidence and the account of the independent witness. The content and manner of the re-enactments by the three officers did not suggest rehearsal or collusion. Each spoke with investigators freely and without constraint.

### III. The Bomb

At approximately 3:00 p.m. on Sunday, June 10, 2012, a male adult approached Tyler Gray, a volunteer firefighter at the Sellersville Fire Company headquarters. He advised that, in the creek which passes under the railroad tracks to the rear of the fire company parking lot, he and his family had discovered a device which resembled a bomb. He had noted this device when he moved a blue garment located on some rocks in the creek bed. Police were summoned and a perimeter was established. Ultimately members of the Allentown Police Department Bomb Squad responded to the location and after examining the device, disrupted it with a series of water shots, interspersed with x-ray attempts to assess the device. Also found in the creek in the immediate location of the blue sweat shorts under the railroad bridge were various papers, some bearing Michael Marino's name and others consisting of typed diatribes consistent in format and content with the paper taped to the rear of Marino's Toyota automobile. Also found with these items were two packages of synthetic marijuana, one labeled "Cloud 9 Mad Hatter" and the other "Zoola". The blue shorts under which these items were initially found smelled strongly of gasoline. In the course of the evacuation of nearby properties and the establishment of a perimeter, a resident advised police that he had seen a blue garment and papers under the railroad bridge on Saturday and at 7:00 a.m. on Sunday morning.

The device in question appeared to be a metal canister, silver in color with two probes and a digital time affixed to one end. The device showed no signs of weathering. The device was approximately one foot long. A pair of gloves and clothing were also found next to the device. Apart from the gasoline with which the shorts covering the device was soaked, no substance was ultimately found which would have been capable of supporting an explosion or fire. Attached to one end of the device was found a printed circuit designed as a timer with a three-digit readout. Pictures of the circuit board, the device itself and the printed materials found with it are attached hereto. Among the printed material found in the creekbed was a bill from Purebulk Nutrition to Michael Marino, address 602 South Perkasio Road in which Marino's e-mail address is shown as dabombactor@....

While no explosive was identified after the device had been disrupted by the use of "water-shots", it should be noted that two empty drain cleaner containers were found in the area immediately

adjacent to the factory where Michael Marino had broken in the day before. Drain cleaner may be used, at least according to internet postings, as one of the precursors with which to fashion a homemade explosive.

#### IV. The Subject

Michael W. Marino, born October 9, 1985, lived as a child in Warminster and resided in Bucks County throughout most if not all of his life. Some records reflect an address of 602 South Perkasio Road, Perkasio, PA 18944. However, investigation indicated that immediately before his death he resided with his sister, Amber Simone, at 2513 Emerald Lane, Quakertown, PA. Ms. Simone took a trip out of the area on the weekend of Marino's death. She advised a neighbor who lived nearby that "Mike has not been taking his medication." She suggested that if the neighbor saw Mike acting strange, he should call the police.

Marino had been convicted of Simple Assault in 2004 and for DUI in 2009. He was arrested for DUI in 2012, which charge was open at the time of his death.

Found in Marino's bodily fluids gathered during the postmortem exam were:

- Amphetamine, a central nervous system stimulant at levels consistent with prescribed dosage
- Caffeine, a well known stimulant at levels consistent with typical use
- Synthetic cannabinoids at detectable levels. Less is known about blood levels associated with particular behavioral effects of these substances. Effects in combination with other stimulants present are said to be unpredictable. In some cases subjects ingesting these substances have shown behavioral effects similar to PCP (phencyclidine hydrochloride) – combativeness with extraordinary strength and indifference to pain.
- THC and other metabolites indicating relatively recent ingestion of marijuana.
- Nicotine and metabolites – another stimulant generally ingested by smoking tobacco.

The two pipes located in the smoking kit found in Marino's clothing were analyzed by the Bucks County Crime Laboratory. In addition to marijuana, they were found to contain residue of three different synthetic marijuana compounds, one of which was also one of the cannabinoids identified in Marino's blood.

The presence of all of these substances in Marino's blood would be consistent with the stimulated, agitated, aggressive and difficult to subdue behaviors he exhibited.

#### V. Prior Violent Police Contact

On March 9, 2011, at 3:27 a.m. Hilltown police were dispatched to 602 South Perkasio Road in their jurisdiction, the apparent residence of Michael Marino at that time. Calls to police radio indicated that Marino was breaking windows and otherwise damaging the property for the stated reason that zombies were coming to kill him. When they arrived in the area, officers encountered

Marino running down South Perkasio Road. Marino was perceived by the officers to be in an intoxicated and agitated state. When approached by the officers, he became angry and the involvement of numerous officers was required to assist medics who were summoned to the scene to subdue Marino and tie him down to a stretcher for transport to Grandview Hospital. During the course of the incident Marino was tasered repeatedly with limited effect. Marino was transported to the Grandview Hospital Emergency Room where assistance was required from a total of six police officers who, together with emergency room staff, had to physically restrain Marino until medical personnel were able to sedate him, at which point he fell asleep without further incident.

#### VI. Tactical Considerations

It is axiomatic that hindsight is 20-20. However, it is impossible to view the outcome of this interaction as acceptable. For the reasons described below, I conclude that, considering all of the circumstances in which he found himself at the instant he drew and fired his weapon, Officer Mumbauer was justified in using deadly force to defend himself and his fellow officers from Michael Marino. However, three physically fit police officers, two of them armed with tasers and batons as well as sidearms and one trained specifically in dealing with mentally ill and drug abusing subjects like Marino, should have been able to avoid the loss of tactical control which led to Officer Mumbauer's being in a position where the use of deadly force was necessary. Fully recognizing that it is easy to criticize the events of a moment from a distance with calm leisure for reflection, I nevertheless offer the following observations.

1. It was a particularly hot day. It does not appear that any exigencies arose requiring any of the officers to answer other calls at the moment. So why not continue efforts to calm the subject verbally, with the objective, if nothing else, of allowing him to wear down, and to metabolize some of the stimulants which had contributed to his state of agitation. This may have eventually rendered him more amenable to a resolution of the situation with less physical force.
2. Assuming that the decision to use physical force at that time was correct, the assumption that Marino had submitted to police authority and would stop struggling once he was cuffed was plainly unwarranted. Marino could have been removed immediately from an area of loose and uneven footing on which he could avail himself of the high ground and on which the officers lacked secure footing. Had he been immediately marched by all three officers to the parking lot and searched in the conventional way by being secured against a wall or a vehicle, control of his person would have been maintained even if he determined to resist. Similarly, given his apparent agitation and believed intoxication, promptly placing him in a secure and contained environment like the back of a police car offered the best chance for control without the need for continued physical interaction.
3. Having failed to remove Marino from a setting in which he could place the officers at risk by throwing his body around and kicking, there appears to be no satisfactory reason for reducing by one-third the available hands and force available to control him. He was an agitated, drug-abusing, mentally ill person and it was foreseeable that he might act out suddenly with extreme violence. Marino was unwashed, sweating profusely and was naked from the waist up, having recently removed the plastic poncho he had been wearing on a hot day. One of the witnesses told investigators that when she first saw him, she thought he may be coming from a pool-party where had he too much to drink. His arms, neck, head and torso had already proved to be slippery and difficult to grip. The approaching Mr. Gallagher did not represent a threat. He



could have been verbally requested to remain at a safe distance and have been assured by the Sergeant that officers would get to him as soon as possible without the need to reduce the force available to contain Marino. If the Sergeant intended to avoid stirring Marino up again by walking away to summon the rescue squad out of Marino's earshot, this could have been delayed until Marino was on safe ground or secured in a patrol car.

However, these are matters of police procedure which lie outside of the prosecutorial authority of the District Attorney. The matter which does lie within my responsibility is whether any crimes were committed in connection with Mr. Marino's death.

#### VII. The Law as It Applies to This Case

A police officer is justified in using deadly force only when he believes that such force is immediately necessary to prevent death or serious bodily injury to himself, other officers or other people within the ambit of risk.

In order for the use of deadly force to be justifiable, the officer's belief must have been reasonable – that is that a reasonable person in the officer's situation would have formed that same belief.

#### VIII. Conclusions

Probably to their credit and reflecting their practicality, in dealing with Mr. Marino the officers completely put aside the fact that, because he had kicked in the door and forcibly gained entry to the abandoned sign company building and unlawfully commenced to occupy same, there was substantial probable cause upon which to arrest him for the felony of criminal trespass by breaking into a building. See 18 Pa.C.S. §3503(a)(ii). However, as to the use of deadly force, the legal principle articulated above is still the applicable one, because the circumstances which would justify the use of deadly force to prevent an arrest from being defeated are not present in this case.

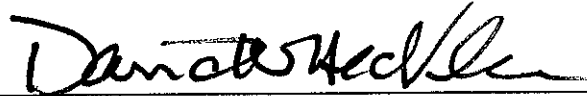
Thus, the decision on whether or not to charge Officer Mumbauer with voluntary manslaughter – a killing where the shooter mistakenly believes that he is justified – turns on the question of whether a reasonable person finding himself or herself in his situation would have formed the belief that it was necessary to use deadly force to prevent himself or one of his fellow officers from being seriously injured or killed. Officer Mumbauer had already seen Officer Graff kicked to the extent that was out of the conflict. Sgt. Rothrock had walked a substantial distance away, removing himself as a factor in the immediate confrontation. Mumbauer had received a stunning kick to the jaw and a subsequent kick to the groin, as a consequence of which he felt that he might lose consciousness and was groggy. Marino was acting with great force and violence. Moreover, Marino was rising from his back – something which he could do more easily on the sloping ground next to the factory than he could have on level ground. Marino gave every indication of his intention to continue to carry the fight to the officer.

It is often said that in moments of emergency one reacts at the level of training. It is unclear how quickly and easily a taser device could have been deployed in this situation or that Mumbauer even considered this option. As the prior reported incident involving Mr. Marino and the Hilltown police demonstrates, it is also uncertain that a taser would have been immediately debilitating. The effectiveness of the kicks already delivered to Mumbauer demonstrated that, cuffed or not, if Marino succeeded in tripping or otherwise knocking Mumbauer down on the uneven ground, Mumbauer could

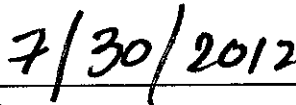
have been kicked into unconsciousness and his weapon taken before either of his colleagues could have intervened. On the existing footing and in his diminished state, Mumbauer could not have been confident in his ability to back-pedal with the rising ballast and railroad tracks immediately behind him or to otherwise remove himself from the situation until the tactical balance had been restored with the Sergeant's help.

The question under the law is whether Mumbauer was unreasonable in that moment in concluding that he could not safely take some alternative action but rather that he needed to draw and fire his weapon.

For the reasons stated above, the interaction between the officers and Marino should not have reached this point. That it did reach this point was not the product of any criminal act by Officer Mumbauer or by either of his fellow officers. Rather it was the product of Michael Marino's continued violent aggression. When events did reach this point, I do not find that Officer Mumbauer's belief that he needed to draw and fire his weapon was unreasonable under the circumstances. Under the applicable law his act was therefore a justifiable homicide.



David W. Heckler, District Attorney



Date